Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 77-1563

PPX ENTERPRISES, INC.,

Petitioner,

-against-

SCEPTER RECORDS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

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IN THE
SUPREME COURT OF THE UINITED STATES
OCTOBER TERM 1977

PPX ENTERPRISES, INC.

Petitioner,

-against-

SCEPTER RECORDS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

Petitioner prays that a writ of certiorari issue to review the judgment and opinion of the New York Court of Appeals entered in this opinion on the 21st day of March, 1978.

OPINION BELOW

The New York Court of Appeals affirmed the order of the Appellate Division, First Department, Chief Judge Breitel and Associate Judge Gabrielli dissenting, which, in turn had affirmed the order of New York County Supreme Court entered on the report of the Special Referee. A copy of the order and decision of affirmance, and dissenting opinion of the New York Court of Appeals appears in the appendix hereto at 1a.* The opinion of the New York Court of Appeals has not been officially reported as yet.

JURISDICTION

The order of the New York Court of Appeals was entered on the 21st day of March, 1978. No requests have been made for extensions of time to file this petition. Jurisdiction of this Court is invoked under Title 28, Section 1257(3), U.S.C. and the petition for a writ of certiorari was filed with the Court within ninety days of that date.

QUESTIONS PRESENTED

Is it a denial of due process of law for a creditor, who has properly attached the property of a debtor pursuant to State law, to be required to prove his case on a preliminary challenge by the debtor, prior to any opportunity for discovery and to prepare and subpoena witnesses or does due process of law secured by the Fourteenth Amendment limit his obligation to a showing that there was probable cause for the attachment?

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Fourteenth Amendment
Section 1. Citizens of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

NEW YORK STATE STATUTE INVOLVED

Rule 6223 of the Civil Practice Law and Rules. Vacating or modifying attachment

(a) Motion to vacate or modify. Prior to the application of property or debt to the satisfaction of a judgment, the defendant, the garnishee or any person having an interest in the property or debt may move, on notice to each party and the sheriff, for an order vacating or modifying the order of attachment. Upon the motion, the court may give the plaintiff a reasonable opportunity to correct any defect. If, after the defendant has appeared in the action, the court determines that the attachment is unnecessary to the security of the plaintiff, it shall vacate the order of attachment. Such a motion shall not of itself constitute an appearance in the action.

(b) Burden of proof. Upon a motion to vacate or modify an order of attachment the plaintiff shall have the burden of establishing the grounds for the attachment, the need for continuing the levy and the probability that he will succeed on the merits.

STATEMENT OF THE CASE

On the 1st day of April, 1975, as an incident to an action brought by petitioner against respondent to recover trust moneys, to wit: commissions on royalties to which petitioner was entitled from respondent for promotion of license agreements for musical tapes produced by respondent, pursuant to the then subdivision (8) of Rule 6201 of the New York Civil Practice Law and Rules, petitioner obtained *ex parte,* a supplementary attachment of property in the sum of $56,000 belonging to respondent, to stand as security for any judgment that might be obtained by petitioner against respondent. A prior attachment in the sum of $30,000 had been obtained by petitioner at the com-

mencement of the action, which had been unsuccessfully challenged by respondent, and appealed to the Appellate Division, First Department, which affirmed its validity. (See, *PPX Enterprises v. Scepter Records, Inc.*, 48 A.D. 2d 1017)

On the 1st day of April, 1975, petitioner made a second *ex parte* attachment of the property of respondent, when it appeared that the original attachment would not be sufficient security for any judgment that petitioner might ultimately recover. Against this attachment, respondent moved on grounds that it was excessive. Special Term referred the motion to a referee to determine whether the said attachment was, in fact, excessive.

A trial took place before Special Referee Edward I. Byer. Referee Byer permitted respondent to call two accountants, Seymour Jones and Thomas E. Hyland, to testify to their opinion concerning the extent of respondent's indebtedness to appellant, predicated upon their examination of the self-serving books of respondent. Referee Byer reached his conclusion as to the alleged excessiveness of the attachment based upon the hearsay testimony of these accountants, having no further foundation than self-serving entries made by respondent in its own books, concerning royalties earned by respondent to which petitioner was entitled to commissions, writing in his report as follows:

> "Scepter retained Cooper & Lybrand, a nationally known accounting firm. Two of their representatives, Seymour Jones, C.P.A., for some 15 years and a partner thereof, and Thomas Hyland, C.P.A., an employee, testified before me. Both examined and analyzed all records of Scepter and PPX to determine the status of their account as of March 31, 1975, which was the last business day before the second attachment was issued. Monies received subsequent to said date are not considered. They prepared schedules A & B (Exhibit A). It showed the total receipts by Scepter from foreign licensees whose contracts had been negotiated by PPX, the artists—producers share of royalties already earned and paid out of such receipts, the payments previously made to PPX, and the maximum amount due to PPX from Scepter. The exhibit showed that total receipts amounted to $529,432. The artists share of earned royalties as reported by the licensees was $41,812. The balance is $417,620. Applying the commission rate of 25% to PPX gives $104,405. Of this sum, $55,645 was paid to PPX. They total $86,767 as of March 31, 1975, leaving an amount due to PPX from Scepter of $17,638, which is the amount Scepter acknowledges as its maximum liability for the purposes of this hearing. . . ."

The agreement also provided that petitioner was entitled to be paid expenses incurred by petitioner in negotiating royalty agreements, which petitioner claimed to be approximately $25,000.00 and respondent conceded to be approximately $20,000.00. However, the Special Referee, gave his own interpretation of the agreement between the parties, and included his interpretation that such indebtedness did not constitute trust funds as contemplated by the parties and therefore was not subject to the attachment.

Edward Chalpin, president of petitioner testified that the accounts of respondent did not take into account royalties due and owing to petitioner from eight additional firms for license agreements negotiated by petitioner on behalf of respondent with these firms, which the Special Referee rejected. Based upon the hearsay testimony of the aforesaid accountants and the effort of the Special Referee to pass upon the credibility of Edward Chalpin, prior to any opportunity to conduct pre-trial discovery in accordance with Article 31 of the New York Civil Practice Law & Rules, Referee Byer reported that the $56,000 second at-

tachment was excessive and indeed, the original $30,000 first attachment, already affirmed by the Appellate Division, First Department, was likewise excessive, in that the maximum indebtedness found by the Special Referee was no more than $17,638, a copy of which is reproduced on page 15a.

On the 29th day of March, 1976, New York County Supreme Court granted a motion by respondent to confirm the report of Special Referee Byer and vacated the second attachment of $56,000. and reduced the first attachment of $30,000. to $17,638, a copy of which is reproduced on page 6a. The Appellate Division, First Department stayed the order vacating the second attachment and reducing the first, pending appellate review. On the 13th day of July, 1976, the Appellate Division, First Department modified the order of New York County Supreme Court to the extent that it overruled the reduction of the first attachment to $17,338 and restored it to $30,000 but affirmed the order vacating the second $56,000 attachment, without opinion; a copy of which is reproduced on page 3a. On the 23rd day of September, 1976, the Appellate Division, First Department continued the stay of execution of the order vacating the second attachment and granted petitioner leave to appeal to the New York Court of Appeals.

On the 21st day of March, 1978, the New York Court of Appeals affirmed the order of affirmance of the Appellate Division, First Department, by a dividend opinion, a copy of which is herein annexed, (on p. 00) Chief Judge Breitel and Associate Judge Gabrielli dissenting in an opinion by the Chief Judge.

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW RAISES SERIOUS AND IMPORTANT QUESTIONS CONCERNING THE RIGHTS OF A CREDITOR, WHO HAS LAWFULLY AND PROPERLY UNDER STATE LAW, ATTACHED PROPERTY OF A DEBTOR THAT MAY CONSTITUTE THE ONLY *REX* AVAILABLE FOR THE ULTIMATE SATISFACTION OF JUDGMENT SHOULD HE PREVAIL AT A TRIAL

The Constitutional issue is one of first impression, to wit, the extent of due process to which a creditor is entitled, where challenge is made to the validity of the attachment and a hearing is ordered on the issue. It is strongly submitted that at such hearing, the Court should be limited to the issue whether there was probably cause for the attachment, not a full blown trial on the validity of the claim of the petitioner that took place in the case at bar. Otherwise, an attachment can turn into a trap for the unwary, where a creditor will be compelled to, in effect, try the merits of his claim at an attachment hearing, prior to opportunity for pre-trial discovery and opportunity to prepare his case. In the case at bar, without any real evidentiary basis, other than disbelief of the testimony of the president of apellant, the Special Referee rejected his claim that the books of respondent were inaccurate, in that they did not take into account royalties owing from eight licensees pursuant to agreements that appellant claimed to have negotiated pursuant to the royalty agreement between the parties. This issue was not ripe for review, prior to pre-trial discovery and opportunity for a full blown trial, with the production of *all* witnesses.

In his well reasoned dissenting opinion, Chief Judge Charles D. Breitel set forth:

"The point is, as appellant has argued apparently in vain, that the reference was not to determine the case on the merits but, in effect, only to determine whether the attachment was excessive in amount, or, as appellant states it, perhaps mistakenly, whether the attachment was in 'good faith.' In so determining, the referee and the courts below should have been sensitive to the preliminary nature of this determination under CPLR 6223: the action had not progressed; there had been no discovery; and complicated interdependent running accounts were involved as to many or most of which plaintiff would be without knowledge of the facts until they had been further explored. An attachment will be of limited use as a provisional remedy if an attaching creditor must, on motion to vacate the attachment, summarily establish his case as if it had been fully tried and determined. The trial and determination was not the referee's function. He was only to determine whether the supplementary attachment was excessive because the support for it was baseless and plaintiff's claim must inevitably have failed. Instead, the referee granted the equivalent of summary judgment in a case where there were disputed issues of fact and no pretrial discovery."

The Supreme Court has had occasion to chart due process requirements for the issuance of an ex parte order of attachment, clearly holding that such attachment must be supported by an affidavit of merits, a showing of statutory grounds and judicial sanction. The failure to meet such basic requirement nullifies the attachment. In *Fuentes v. Shevin,* 407 U.S. 67 (1972), the Court wrote:

"The constitutional right to be heard is a basic aspect of the duty of government to follow a fair process of decision making when it acts to deprive a person of his possessions. The purpose of this requirement is not only to ensure abstract fair play to the individual. Its purpose, more particularly, is to protect his use and possession of property from arbitrary encroachment—to minimize substantively unfair or mistaken deprivations of property. . . . A temporary, nonfinal deprivation of property is nonetheless a 'deprivation' in the terms of the Fourteenth Amendment"

"Any significant taking property by the State is within the purview of the due process clause." *North Georgia Finishing, Inc. v. DiChem, Inc.,* 419 U.S. 601 (1974)

However, where an attachment is ordered by a judicial officer pursuant to State law, after examination of an affidavit of merits, albeit submitted ex parte, with opportunity for prompt challenge, the due process requirement of the Fourteenth Amendment has been met and the attachment is entitled to Constitutional protection. It was thus held in *Mitchell v. W.T. Grant Co.,* 416 U.S. 600 (1974):

"In our view, this statutory procedure effects a constitutional accommodation of the conflicting interests of the parties. We cannot accept petitioner's broad assertion that the Due Process Clause of the United States Constitution guaranteed to him the use and possession of the goods until all issues in the case were judicially resolved after full adversary proceedings had been completed."

In the case at bar, there is no dispute that the attachment under challenge was issued only after full compliance with the safeguards outlined by the Supreme Court in *Mitchell.*

The evolution of the Supreme Court's examination of the attachment procedures of the various States would seem to gracefully lead to an examination of the issues presented by this case, to wit, the degree of due process owing to an attaching creditor at a hearing ordered in compliance with the State statutory scheme making

available such hearing on a challenge to the propriety of such attachment. It is the position of petitioner that the scope of the hearing was too broad at this preliminary stage of the case, that it resulted in a deprivation of due process of law. "Due process requires that there be an opportunity to present every available defense." *Lindsay v., Normet,* 405 U.S. 56 (1972); *American Surety Co. v. Baldwin,* 287 U.S. 156 (1932).

Unless procedural due process be afforded a creditor, a remedy afforded him by state law to assure ultimate satisfaction of his claim, can turn into a trap and what is more, not only dissipate the security that the attachment was intended to provide, but expose him to a damage claim for seeking an attachment in the first instance. There is a sensitive balancing issue, requiring Constitutional pronouncement in order that both the creditor and the debtor enjoy the protection of due process of law that the Fourteenth Amendment guarantees to both.

CONCLUSION

THE PETITION FOR CERTIORARI SHOULD BE GRANTED AND THE ORDER BELOW REVERSED.

Respectfully submitted,

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OPINION OF APPELLATE DIVISION

Stevens, P.J., Markewich, Murphy, Capozzoli, Nunez, JJ.

2903N

PPX Enterprises, Inc.,
Plaintiff-Appellant,

-against-

Scepter Records, Inc.,
Defendant-Respondent.

Order entered March 30, 1976, in the Supreme Court, New York County (Hughes, J.) unanimously modified on the law to strike that portion of the fourth ordering paragraph which modified and reduced the order of attachment made on September 4, 1974 to $17,638, and to reinstate in full the amount of $30,000, and to further substitute the figure of $30,000 in the subsequent ordering paragraphs of said order in place of $17,638 where such figure appears. As so modified the order is otherwise affirmed without costs and without disbursements.

The only issue referred to the Special Referee by the order of reference was the issue of whether or not the $56,000 amount prescribed by the supplemental order of attachment was excessive. The Special Referee found such amount excessive and recommended vacatur of the supplemental order of attachment. While the Special Referee found $17,638 to be "the maximum amount of the claim of PPX for attachment purposes proven" before him, the question of the validity of the original $30,000 attachment was not a subject of the reference. Special Term adopted

and confirmed the report of the Special Referee and additionally reduced the $30,000 attachment to $17,638. Since the scope of the reference was limited to the question of excessiveness of the $56,000 supplemental attachment, there appears to have been no justification or warrant for the reduction of the original $30,000 attachment. Earlier, a motion to vacate such attachment had been denied at Special Term and the denial affirmed by this Court (48 A D 2d 1017). The validity of such attachment should await a trial of the issues.

Order filed.

ORDER OF THE APPELLATE DIVISION FIRST DEPARTMENT MADE JULY 13, 1976

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on July 13, 1976,

Present—Hon. Harold A. Stevens, Presiding Justice,
Arthur Markewich,
Francis T. Murphy, Jr.,
Louis J. Capozzoli,
Emilio Nunez, Justices.

PPX Enterprises, Inc.,
Plaintiff-Appellant.

-against-

Scepter Records, Inc.,
Defendant-Respondent.

2903N

An appeal having been taken to this Court by the plaintiff-appellant from an order of the Supreme Court, New York County (Hughes, J.), entered on March 30, 1976, granting defendant's motion to confirm the report of the Special Referee, and said appeal having been argued by Mr. Mortimer Sattler of counsel for the appellant, and by Mr. Robert K. Ruskin of counsel for the respondent; and due deliberation having been had thereon, and upon the memorandum decision of this Court filed herein,

It is unanimously ordered that the order so appealed from be and the same is hereby modified, on the law, to strike that portion of the fourth ordering paragraph which modified and reduced the order of attachment made on September 4, 1974 to $17,638, and to reinstate in full the amount of $30,000, and to further substitute the figure of $30,000 in the subsequent ordering paragraphs of said order in place of $17,638 where such figure appears. As so modified, the order is otherwise affirmed, without costs and without disbursements.

ENTER: s/ HYman W. Gamso

Clerk

MEMORANDUM DECISION OF THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATE OF NEW YORK
COURT OF APPEALS

No. 99

PPX Enterprises, Inc.,

Appellant,

vs.

Scepter Records, Inc.,

Respondent.

(99) Sherman P. Rothman, Kew Gardens, for appellant. Robert K. Ruskin & Jeffrey L. Liddle, NY City, for respondent.

MEMORANDUM:

The order of the Appellate Division should be affirmed, with costs.

After obtaining an original order for attachment in the amount of $30,000, the validity of which was upheld by the Appellate Division (48 AD2d 1017), plaintiff obtained a supplemental order of attachment in an additional amount of $56,000. On a motion to vacate or to modify the second attachment, vacatur was denied but the issue of "whether or not the amount prescribed by the supplemental attachment is excessive" was referred to a referee to hear and report with recommendations. Following five days of hearings which consisted of testimony by certified public accountants for both parties and by plaintiff's president and produced over 800 pages of transcript and 43 exhibits, the referee reported in a summary description of the accounts between the parties that "as of March 31, 1975 [the

day before issuance of the second attachment], the maximum amount of the claim of PPX for attachment purposes proven before me is $17,638." On that basis he recommended that the supplemental order of attachment be vacated. Supreme Court granted defendant's motion to confirm the report of the referee, vacated the supplemental order of attachment and also reduced the amount of the original attachment from $30,000 to $17,638. The Appellate Division modified by deleting the reduction of the first attachment on the ground that the validity and amount of that attachment had not been before Supreme Court or the referee, and otherwise affirmed.

On the appeal to us, plaintiff does not challenge the details, analysis or computation of the accounting reported by the referee. Rather plaintiff asserts that the reference should have been limited to inquiry and report as to the "good faith" of plaintiff's claim and that it was therefore error on the part of the referee to give a nonbinding advisory opinion on the merits of the controversy without opportunity for pretrial, discovery and production of witnesses.

The record fails to disclose any objection by plaintiff to the generality of the reference to the referee, any application to the court or to the referee to make the terms of the reference more specific, or any attempt prior to receipt of the report of the referee to limit the scope of the reference as it is now contended should have been done. In these circumstances we conclude that the contention of error, if any, presently advanced has not been preserved for appellate review.

* * * * * * * * * * *

Order affirmed, with costs, in a memorandum. Question certified answered in the affirmative. All concur except Breitel, Ch.J., who dissents and votes to reverse in an opinion in which Gabrielli, J., concurs.

Decided March 21, 1978

BREITEL, Ch. J. (dissenting):

I dissent and vote to reverse and reinstate the supplemental attachment.

Concededly, the reference to the Special Referee was solely to determine whether the supplemental attachment was excessive. Possible constitutional strictures derivable by implication from *Carey v. Sugar* (425 US 73) were not, and are not, applicable to this case, because of Special Term's determination in the order of reference that, pursuant to the agreements, trust funds were involved. Indeed, the referee in his report stated that he was bound by the holding that trust funds held for the benefit of plaintiff were involved provided they had been received.

The underlying claims involve running accounts, not only between plaintiff and defendant, but between defendant and its overseas licensees. What was owed and what was received were sharply disputed, as disputed as are the briefs submitted on this appeal. It may even be agreed that, as to many of the items, plaintiff, credibility aside, failed to establish by a preponderance of the evidence that it would succeed. On the other hand, as to such disputed issues, and particularly as to those claims where the referee juxtaposed the contradictions between plaintiff's former principal, Chalpin, and defendant's principal, Goff, it cannot be said that in the action yet to be tried plaintiff must fail (see *Regnell v. Page*, 82 Misc 2d 506, 510-511 [Arnold L. Fein, J.], decided after the holding in *Sugar v. Curtis Circulation Co.*, 383 F Supp 643; see, generally, 7A Weinstein-Korn-Miller, NY Civ Prac, pars 6223.01 et seq., discussing New York's attachment statutes in the light of the cloud cast on them by *Sugar v. Curtis Circulation Co., supra*, and *Carey v. Sugar, supra*, especially pars 6223.01, 6223.05, 6223.09).

The point is, as appellant has argued apparently in vain, that the reference was not to determine the case on the merits but, in effect, only to determine whether the

attachment was excessive in amount, or, as appellant states it, perhaps mistakenly, whether the attachment was in "good faith." In so determining, the referee and the courts below should have been sensitive to the preliminary nature of this determination under CPLR 6223: the action had not progressed; there had been no discovery; and complicated interdependent running accounts were involved as to many or most of which plaintiff would be without knowledge of the facts until they had been further explored. An attachment will be of limited use as a provisional remedy if an attaching creditor must, on motion to vacate the attachment, summarily establish his case as if it had been fully tried and determined. That trial and determination was not the referee's function. He was only to determine whether the supplementary attachment was excessive because the support for it was baseless and plaintiff's claim must inevitably have failed. Instead, the referee granted the equivalent of summary judgment in a case where there were disputed issues of fact and no pretrial discovery.

It is true that on this appeal plaintiff has argued that the reference was to determine its "good faith" in obtaining the supplemental attachment. That misuse of words of art, of course, is an unfortunate characterization of the reference to determine excessiveness. In fact, however, an intentionally excessive attachment is one taken in "bad faith." Plaintiff's linguistic imprecision, if that it be, should not becloud the real issue.

Accordingly, I dissent and vote to reverse and reinstate the supplemental attachment.

* * * * * * * * * * * *

Order affirmed, with costs, in a memorandum. Question certified answered in the affirmative. All concur except Breitel, Ch.J., who dissents and votes to reverse in an opinion in which Gabrielli, J., concurs.

Decided March 21, 1978

ORDER OF SPECIAL TERM, PART I, NEW YORK SUPREME COURT

At a Special Term, Part I of the Supreme Court of the State of New York, held in and for the County of New York, at 60 Centre Street, New York, New York, on the 29th day of March, 1976.

PRESENT:

HON. THOMAS J. HUGHES,
JUSTICE.

PPX ENTERPRISES, INC.,

Plaintiff,

-against-

SCEPTER RECORDS, INC.,

Defendant.

The Defendant moved for an order (a) confirming the report of Edward I. Byer, Special Referee, (b) directing, in accordance with the report and recommendations of Referee Byer, that the supplemental order of attachment granted plaintiff on April 1, 1975 be vacated and that the initial order of attachment granted plaintiff on September 4, 1974 be reduced to the amount of $17,638, (c) directing the Sheriff to pay over to defendant all sums being held by him pursuant to the aforesaid attachment orders in excess of the sum of $17,638, and (d) directing the plaintiff to pay to the defendant all expenses incurred by reason of the excessive attachment. The motion regularly came on to be heard before me at Special Term, Part I, on January 16, 1976 and was granted in a memorandum decision dated February 26, 1976. Therefore,

Upon the Notice of Motion dated December 31, 1975, the affirmation of Robert K. Ruskin dated December 31, 1975, the report of Special Referee Edward I. Byer dated December 24, 1975, the order of reference of Mr. Justice Hughes dated May 14, 1975, and the reply affidavit of Robert K. Ruskin, sworn to n January 21, 1976, and the exhibits annexed thereto, all in support of the motion; the affidavit of Raymond Brody, sworn to on January 12, 1976, and the exhibits annexed thereto, in opposition to the motion; and the memorandum decision of Mr. Justice Hughes dated February 26, 1976, granting the motion, it is

ORDERED that the motion be and the same is hereby in all respects granted, and it is further

ORDERED that the report of Special Referee Edward I. Byer, dated December 24, 1975, be and the same is hereby in all respects confirmed, and that the recommendations made therein be and the same are hereby in all rspects adopted, and it is further

ORDERED that the supplemental order of attachment made herein on April 1, 1975, in the amount of $56,000, be and the same is hereby in all respects vacated and set aside, and it is further

ORDERED that the order of attachment made herein on September 4, 1974, in the amount of $30,000, be and the same is hereby modified and reduced to the amount of $17,638, and it is further

ORDERED that all levies of attachment made by the Sheriff of the County of New York under the aforesaid orders of attachment of September 4, 1974 and April 1, 1975 be and the same are hereby in all respects vacated and set aside to the extent that they exceed $17,638, plus probable interest thereon, costs, and allowable Sheriff's fees and expenses relative to a levy upon $17,638, and it is further

ORDERED that the Sheriff of the County of New York pay over to Baer & Marks, as attorneys for the defendant, all sums being held by him pursuant to the aforesaid orders of attachment of September 4, 1974 and April 1, 1975 in excess of the sum of $17,638, plus probable interest thereon, costs, and allowable Sheriff's fees and expenses relative to a levy on $17,638, within 10 days after the service upon him of a copy of this order, together with notice of entry thereof, and it is further

ORDERED that the plaintiff shall be liable to the Sheriff of the County of New York for all fees and expenses as may be due to him on that portion of the attachments levied herein in excess of the sum of $17,638, plus probable interest thereon, costs, and allowable Sheriff's fees and expenses relative to a levy on $17,638, and it is further

•••

ENTER

THOMAS J. HUGHES,
J.S.C.

MEMORANDUM DECISION, HUGHES J., DENYING MOTION TO VACATE OR MODIFY

SUPREME COURT : NEW YORK COUNTY
SPECIAL TERM : PART I

PPX ENTERPRISES, INC.,

Plaintiff,

-against-

SCEPTER RECORDS, INC.,

Defendant.

HUGHES, J.:

Defendant's motion to vacate or modify a supplemental order of attachment pursuant to CPLR 6223 is decided as hereinafter set forth.

This action is based upon conversion of personal property and misappropriation of trust funds alleged to belong to the plaintiff pursuant to two agreements dated July 1971 and September 1971. An initial order of attachment in the amount of $30,000 was obtained ex parte on September 4, 1974. A motion to vacate was thereafter brought on and denied on October 7, 1974. Subsequently defendant moved for reargument based upon constitutional grounds pursuant to Sugar v. Curtis Circulation Co., 383 F. Supp. 643. This motion was likewise denied pursuant to order of Justice Sidney A. Fine, December 4, 1974. Thereafter, plaintiff upon discovering that additional funds were owing and allegedly converted moved for and was granted a supplemental attachment, in the amount of $56,000 which is now at issue.

The facts herein have been amply described in the various prior decisions and no further recital is necessary.

Defendant contends that the September agreement providing simple commissions supersedes the July agreement which requires defendant to hold such commissions in trust and accordingly as a matter of law no attachment may issue (See CPLR 6201(8)).

I do not agree. It is law that unless the parties clearly intend that a later agreement is to supersede a prior agreement each of them will be given full force and effect (Blair & Co. v. Otto, 5 AD 2d 276). Such intent may be manifested in the agreements themselves or in surrounding writings. In this regard defendant's letter to plaintiff (exhibit "6" to the affidavit of Edward Chalpin) is informative. Said letter in pertinent part states as follows:

> "Pursuant to our *agreement dated July 16, 1971 and any other agreement* relating to said agreement entered into between P.P.X. and Sceptor Records. . . ." (Emphasis supplied)

From the foregoing it is readily apparent that such intent is lacking and an attachment may issue.

As to defendant's objection on constitutional grounds I acquiesce in and adopt the language embodied in Justice Fine's decision dated December 4, 1974 wherein he denied reargument on the very same grounds. Said decision in pertinent part reads as follows:

> "In the instant action plaintiff alleges a possessory interest in trust funds and this action is for conversion of personal property and misappropriations of trust funds. The moneys involved are wholly owned by the plaintiff. In those circumstances the defendant is procedurally protected by the attachment statutes. And under Mitchell v. W. T. Grant Co., 42 U.S.L. W 4671 (May 13, 1974) it cannot be held that defendant has been deprived of his property because of lack of procedural due process of law."

Lastly defendant has not sustained the burden of proving that plaintiff is not in need of further security or that plaintiff wil ultimately fail in this actin (Friedman v. Wilson Sec. Corp., 31 A.D. 2d 627). Mere unsupported allegations are insufficient for this purpose.

For the foregoing reasons the motion insofar as it seeks vacatur is denied.

As to the alternate request for modification the issue of whether or not the amount prescribed by the supplemental attachment is excessive cannot be determined upon the papers submitted. As to that issue only, a reference is required and same is respectfully referred to the Hon. Edward I. Byer, Special Referee of this Court, to hear and report with his recommendations. Pending receipt of the referee's report the alternate relief portion of the motion is held in abeyance. The parties are directed to serve a copy of this order on the Office of the Referees, Room 308-M, within ten days from date of entry hereof.

Dated: May 14, 1975

Filed: May 16, 1975

Thomas J. Hughes, J.S.C.

REPORT OF SPECIAL REFEREE DATED DECEMBER 24, 1975

SUPREME COURT: COUNTY OF NEW YORK

PPX ENTERPRISES, INC.,

Plaintiff,

-against-

SCEPTER RECORDS, INC.,

Defendant.

TO THE SUPREME COURT, COUNTY OF NEW YORK, SPECIAL TERM, PART I:

By an order of Mr. Justice Thomas J. Hughes dated May 14, 1975, I was designated to hear and report with recommendations whether the amount of $56,000 granted in the supplemental attachment is excessive.

Defendant Scepter Records, Inc. moved to vacate the supplemental order of attachment granted plaintiff on April 1, 1975. This resulted in the order of reference.

Hearings were held on June 24, August 5, August 6, September 3 and October 14, 1975. Transcription of the minutes is annexed. Final submission was made on November 25, 1975, by receipt of memoranda.

An initial order of attachment in the amount of $30,000 was obtained ex parte on September 4, 1974.

Defendant unsuccessfully moved to vacate it. The total amount of Scepter's funds attached pursuant to both orders is $114,600 ($86,000 plus fees of $28,600).

The order of reference does not refer to the earlier attachment, therefor it cannot be reviewed herein.

Nor can I hold that a later agreement between the parties (September agreement) superseded an earlier agreement (July agreement) in view of the language pertaining thereto, expressed in the order of reference.

Plaintiff (PPX) represents phonograph record manufacturers in connection with the negotiation of licensing agreements with other phonograph record manufacturers, permitting the use of master recordings owned and controlled by the companies it represents.

Defendant (Scepter) has for some years been engaged in the business of manufacturing phonograph records and tapes recorded by its artists and performers.

The parties entered into a written agreement dated July 16, 1971. It contained the following provisions:

"PPX Enterprises Inc. shall represent Scepter Records and its subsidiaries for its entire catalogue for the World excluding the United States and Canada, upon expiration date of its present agreement with Compo." (Par. 1)

* * *

"As consideration PPX shall earn 25% of gross monies and royalties for the term of any contracts it has negotiated less royalty due to the artists. Monies due to the artist shall include only those monies actually paid to artist.

In cases where advances are made and monies are not due yet to the artists, unearned royalties and producers (sic) shall be put in escrow until six months after release and then divided between Scepter and PPX . . . " (Par. 5)

* * *

"In cases of expenses, which shall be reasonable, incurred by PPX in exploitation of Scepter's catalogue, these expenses shall be deducted from gross receipts on a basis of 75% to be paid by Scepter, and 25% to be paid by PPX Enterprises Inc. . . . ." (Par. 6)

". . . All monies received shall be considered owned 25% by PPX Enterprises, Inc., and 75% by Scepter even though the checks are made payable to Scepter. Such monies shall be held in trust by Scepter and paid within three (3) days after clearance of checks received by Scepter from various licensees." (Par. 7)

In September 1971 the parties entered into a second agreement. Included among its provisions is the following:

"The sole commission to PPX hereunder shall be twenty-five (25%) percent of all gross monies received during the term of any contracts negotiated hereunder after deduction of artist and/or producer royalties actually due and payable. Scepter shall have the right to retain a proportionate amount in reserve for artists and producers royalties. PPX shall not be entitled to compensation on presently existing contracts, except if PPX shall recover royalties due to Scepter and unpaid it shall receive as its fee 25% of the remainder of the deduction of audit fees and producers and artists royalties."

* * *

"In the event the monies reserved for the artist or producer are not payable for any reason, and the artist is not paid within the following 18 months, PPX shall receive 25% of the unpaid monies."

Scepter retained Cooper & Lybrand, a nationally known accounting firm. Two of their representatives, Seymour Jones, C.P.A., for some 15 years and a partner thereof, and Thomas Hyland, C.P.A., an employee, testified before me.

Both examined and analyzed all records of Scepter and PPX to determine the status of their account as of March 31, 1975, which was the last business day before the second attachment was issued. Monies received subse-

quent to said date are not considered (T636-637).

They prepared schedules A & B (Exhibit A). It showed the total receipts by Scepter from foreign licensees whose contracts had been negotiated by PPX, the artists—producers share of royalties already earned and paid out of such receipts, the payments previously made to PPX either by Scepter or by the foreign licensees directly to PPX, and the maximum amount due to PPX from Scepter. The exhibit showed that total receipts amounted to $529,432. The artists share of earned royalties as reported by the licensees was $111,812. The balance is $417,620. Applying the commission rate of 25% to PPX gives $104,405. Of this sum, $55,645 was paid to PPX. Additionally, it showed $31,118 was paid by licensees directly to PPX They total $86,767 as of March 31, 1975, leaving an amount due to PPX from Scepter of $17,638, which is the amount Scepter acknowledges as its maximum liability for the purposes of this hearing. However, it reserves its claim that under the terms of the July and September agreements it is entitled to hold back moneys as a reserve for unearned royalties.

PPX was granted access to all records of Scepter relating to the issue herein. PPX engaged Leo Strauss, CPA, to make such examinations and who testified on the trial. The principal witness was Edward Chalpin, president of PPX.

One item bearing on expenses can be summarily decided. PPX claims expenses in the vicinity of $24,000 incurred under the July and September agreements, which it maintains comes under the trust provision contained in the July agreement. Scepter concedes for the purpose of the hearing that the expenses are about $20,000.

Under the trust provision, it is only " . . . monies received shall be considered owned 25% by PPX Enterprises, Inc., and 75% Scepter even though the checks are made payable to Scepter" shall constitute trust funds. It is

unprofessional to take an excerpt out of context as proof that expenses are trust money, without including the quoted words.

When the trust provision is read in its entirety, expenses, which have never been "monies received" by Scepter, can in no way be considered trust money held by Scepter.

Chalpin testified that in addition to the 18 licensees listed in Schedule B, he negotiated agreements with 8 other licensees which were duly executed, not in his possession and with but one exception, have not been produced by defendant.

Scepter argues in its brief that PPX failed to "establish that PPX had, in fact, negotiated agreements with such licensees, showed that there were no agreements between Scepter and such licensees, or showed that all payments eceived from such licensees had been credited to PPX. In no instance did PPX establish that it was entitled to any additional sums with respect to any one of these licensees." These 8 licensees are discussed below:

(1) *The Top Tape Account*

There was no proof of an executed agreement between Top Tape and Scepter on future royalties. Scepter did receive $20,000 from Top Tape of which PPX acknowledged receipt of $5,000. No proof has been submitted that any additional monies were received by Scepter from Top Tape.

(2) *Record Distributors*

Chalpin contended that he negotiated an agreement. But the exhibit in evidence does not show it was executed by Scepter. However, if Scepter did receive any monies as a result of Chalpin's services, it may be obligated to Chalpin, irrespective of the absence of it's signature on the agreement. But the fact remains that PPX has failed to adduce probative evidence of the receipt by Scepter on the Record Distributors account.

(3) *Springboard Account*

PPX did not assert this claim prior to the hearing. In any event, Mr. Goff, acting for Scepter testified that he told Mr. Chalpin not to negotiate with Springboard. That the principal of Springboard whom Mr. Goff had known for many years, preferred to do business only with Mr. Goff. The latter did make a license agreement with Springboard Mr. Chalpin insisted that he was entitled to commissions on the deal. They agreed to let Mr. Ed Kushins, an employee of Scepter, decide the issue. Mr. Kushins determined that Chalpin was entitled to $2,000. which Scepter paid to Chalpin.

(4) *MCA Canada*

There was a prior agreement before July 16, 1971, between Scepter and MCA. No proof has been adduced of any subsequent executed agreement. PPX did receive a $2,000 check payable to it by MCA. It was an advance payment of anticipated sales. The check was not deposited and there was no proof that the deal was consummated. The check was accepted in evidence provisionally pending receipt of a copy of the back of the check which was not produced.

On this item PPX attempts to claim the existence of an agreement pursuant to Ex. 36 in evidence (T. 626). This is a work sheet prepared by Mr. Strauss, PPX's accountant, who examined Scepter's records. Certain moneys were listed showing an indebtedness from Scepter to PPX. There is no proper accounting basis for such record.

Mr. Strauss, on cross examination, admitted the items were given to him by Mr. Chalpin. This is not probative. It is hearsay. Chalpin's testimony did not prove anything with respect to this account.

(5) *Toniton A. B.*

On this account, PPX does not show that it was the inducing cause in the agreement signed almost one year after termination of PPX's agreements with Scepter. Nor

was there evidence of any payments made and converted as part of the attachment.

(6) *Orfeon Videovoy* (New Agreement)

PPX refers to an agreement with Discos Capital DeMexico (Ex. 6, T. 305). But that is not proof of a license agreement with Orfeon.

(7) *Festival.* (New Agreement)

PPX claims it negotiated a new license agreement with Festival (T 329-331). But no such new license agreement was ever executed (T. 330).

(8) *Teichiku* (New Agreement)

Scepter recognized this obligation and has credited PPX with the sums received under its contract which are included as part of the total receipts.

PPX claims payment from Scepter for collecting monies for Scepter on PPX existing license agreements with 8 companies negotiated by Mr. Chalpin.

The September 1971 agreement contains the provision bearing on such claim, reading:

> "PPX shall not be entitled to compensation on presently existing contracts, except if PPX shall recover royalties due to Scepter and unpaid, it shall receive as its fee 25% of the remainder of the deduction of audit fees and producers—artists royalties."

PPX would be entitled to any monies collected on the pre-existing agreements if it was authorized to collect from specific accounts and was responsible for the collection.

Mr. Chalpin testified that as to those 8 firms, he was authorized to do so by Mr. Goff, an officer of Scepter.

Mr. Goff denied that he gave any general authorization to Chalpin to make the collections. He recalls in only two instances was Chalpin authorized to do so. They were Orfeon in Mexico and Top Tape in Brazil. That no money was collected from Orfeon. As for Top Tape, Chalpin was paid.

However, he did testify that there was a discussion with Mr. Chalpin to collect from foreign accounts monies due Scepter and he considered it part of Chalpin's job. However, he thought it was a matter of convenience for Scepter for him to pick it up rather than wait for the money to come in directly from the licensee. That Chalpin was reluctant to do collecting unless he was paid for it. This resulted in arguments and Mr. Goff said Chalpin did very little. He admitted that he asked Chalpin to pick up the money but on condition he would not pay him to do so.

However, I cannot believe that as to such accounts Chalpin would pick up past due money without expecting payment.

Chalpin is entitled to claim as part of the attachment such monies collected by him and remitted to Scepter. But I am unable to fix such amount. Chalpin has not shown the amounts he *collected.*

Mr. Strauss' record is of no avail. He admitted that the figures below $529,432 (Ex. 36) were obtained from discussions with Mr. Chalpin and his claim that he was responsible for collecting those sums from the licensees although he did not negotiate the contracts (Tr. p. 666 Sept. 3 hearing). This is not proper evidence.

Furthermore, some particular items were included in Ex. 36 which finds no support such as an $11,000 item on MCA Canada, $13,500 for which no receipt by Scepter is shown. Items of $4,350 and $3,000 claimed as additional commissions had been reported by Scepter's accountants and credited to PPX.

The bulk of PPX's claims are based on conjecture and speculation. They are not substitutes for probative proof.

I find that as of March 31, 1975, the maximum amount of the claim of PPX for attachment purposes proven before me is $17,638.

I recommend that the supplemental attachment order in the amount of $56,000 be vacated.

Any claims for expenses based on the vacation is a matter for Special Term, since it is not within the scope of the reference.

Respectfully submitted,

EDWARD I. BYER
Special Referee

Dated: December 24, 1975